Supreme Court, U.S.
FILED
OCT 28 1993
OFFICE OF THE CLERK

93-687

No. 93-_____

In The
Supreme Court of the United States
October Term, 1993

PUPPOLO FAMILY TRUST,
PLUSCUAM FAMILY TRUST,

Petitioners/Claimants,

and

$36,333.50 IN U.S. CURRENCY, etc.*

Petitioners/Defendants,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

BRENDA GRANTLAND
Attorney for Petitioners
265 Miller Avenue,
Mill Valley, CA 94941
(415) 380-9108

10 pp

QUESTIONS PRESENTED

1. Did the District Court err in requiring the claimants to prove standing -- at a pretrial "show cause" hearing on the government's motion for summary judgment -- without requiring the government to first show probable cause to believe the property was forfeitable?

2. Did the court apply the wrong standard for determining standing on a government motion for summary judgment, when it placed the burden of proof on claimants, at a show cause hearing, to establish standing by a preponderance of the evidence?

FULL LISTING OF PETITIONERS

PUPPOLO FAMILY TRUST, PLUSCUAM FAMILY TRUST,

Petitioners/Claimants,

$36,333.50 IN U.S. CURRENCY, ONE BLACK MERCURY ZEPHYR VIN: 1MEBP71B1CK627651, ONE MONEY ORDER No. 04-443,512,526, PURCHASED AT FIRST STATE BANK, ALBANY, GEORGIA, AND CASHIER'S CHECKS, Nos. 1590924, 039032, 09101243, 78596, 0390, 005922, 462-542-0504, 36336, 1572163, 106713998, 12030, 30871, and 70128,

Petitioners/Defendants,

TABLE OF CONTENTS

Questions Presented i

Full Listing of Petitioners ii

Table of Authorities vi

PETITION FOR CERTIORARI

Opinions Below 1

Jurisdiction 1

Statutes Involved 2

Statement of the Case 5

The Property Seized 5

The Trusts 6

The Forfeiture Case 8

The Appeal to the Eleventh Circuit 9

REASONS FOR GRANTING THE PETITION

1. The District Court erred in requiring the claimants to prove "standing" before requiring the government to prove probable cause 10

a. Probable cause must be determined before a claimant can be required to show standing 10

b. Only a factual dispute is required for a threshold showing of standing 12

c. Had the court forced the government to show probable cause first, some of the property seized would not have been forfeited 15

2. When the District Court required the claimants to prove standing by a preponderance of the evidence, it applied the wrong standard for determining standing on a motion for summary judgment 16

a. The proper standard for determining whether to grant summary judgment is whether there are material facts in dispute 17

b. The court acted as if the hearing were the trial on the merits rather than the government's motion for summary judgment on the issue of standing 18

1. The court indicated that credibility of the claimants' witness was at issue 18

2. The judge made comments indicating he was weighing claimants' evidence against the government's 18

3. The judge discussed the burden of proof at the hearing 19

4. In granting summary judgment, the court impermissibly placed the burden of proving ownership on the claimants, without first requiring the government to show probable cause 20

c. The trust introduced sufficient evidence of standing to withstand summary judgment 21

CONCLUSION 23

APPENDICES

A. Judgment of the Court of Appeals..... A1

B. Memorandum Order of the District Court..... B1

TABLE OF AUTHORITIES

STATUTES

18 U.S.C. § 981 ..... 5, 10

19 U.S.C. § 1615 10

31 U.S.C. § 5313 ..... 5, 14

31 U.S.C. § 5324 ..... 5, 14

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986) 17, 18

Austin v. United States, ___ U.S. ___, 113 S.Ct. 2801 (1993) 23

United States v. A Fee Simple Parcel, Bal Harbour, Fla., 650 F.Supp. 1534 (E.D. La. 1987) 12

United States v. A Single Family Residence ... Located at 900 Rio Vista Blvd., 803 F.2d 625 (11th Cir. 1986) 11

United States v. $15,500, 558 F.2d 1359 (9th Cir. 1977) 11

United States v. $47,875, 746 F.2d 291, 298 (5th Cir. 1984) 13

United States v. Four Parcels of Property, 941 F.2d 1428 (11th Cir. 1991) 17

United States v. One 1982 Porsche 928, 732 F.Supp. 447, 452 (S.D.N.Y. 1990) 12

United States v. One 1976 Cessna Model 210L Aircraft, 890 F.2d 77, 80 (8th Cir. 1989) 11, 13

United States v. One Parcel... Known As 116 Emerson Street, 942 F.2d 74, 78 (1st Cir. 1991)..... 12

United States v. Premises Known as 526 Liscum Drive, 866 F.2d 213 (6th Cir. 1988)..... 11

United States v. $321,470, 874 F.2d 298 (5th Cir. 1989) 13

United States v. $38,000, 816 F.2d 1538 (11th Cir. 1987) 10, 12, 21, 22

United States v. $38,570, 950 F.2d 1108, 1111-12 (5th Cir. 1992)..... 11, 13, 15, 16, 21

United States v. $30,800, 555 F.Supp. 280 (E.D.N.Y. 1983) 11

United States v. 2511 E. Fairmont Ave., 722 F.Supp. 1273 (D.Md. 1989)..... 11

United States v. $280,505, 655 F.Supp. 1487, 1495 (S.D. Fla. 1986)..... 14

OTHER AUTHORITIES

David B. Smith, *Prosecution and Defense of Forfeiture Cases,* (June 1993 ed.)..... 14

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner-Claimants, Puppolo Family Trust and Pluscuam Family Trust, respectfully pray that a writ of certiorari issue to review the decision of the Eleventh Circuit, entered on June 2, 1993, affirming the judgment of the Honorable Wilbur D. Owens, Jr., District Judge, Middle District of Georgia.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals' order affirmed the judgment below, without opinion, on June 2, 1993. The order, which is not to be published, is set out at Appendix A.

The memorandum opinion of the District Court for the Middle District of Georgia (Wilbur D. Owens, Jr., J), entered on June 8, 1992, also unpublished, appears in Appendix B.

JURISDICTION

The decision of the U.S. Court of Appeals for the Eleventh Circuit was entered June 2, 1993. Petitioners' Application for Extension of Time to File Petition For Writ of Certiorari, filed August 31, 1993, was granted by the Honorable Justice Kennedy on September 2, 1993, extending time for filing the certiorari petition until October 29, 1993.

This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Part V of Title IV of the Tariff Act of 1930, as amended, provides:

> In all suits or actions ... brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage ... where the property is claimed by any person, the burden of proof shall lie upon such claimant; ... Provided, that probable cause shall first be shown for the institution of such suit...

19 U.S.C. § 1615. This section was incorporated by reference into the "money laundering" civil forfeiture statute, 18 U.S.C. § 981(d).

The Bank Secrecy Act of 1970, as amended, provides in pertinent part:

> **31 U.S.C. § 5313. Reports on domestic coins and currency transactions**
>
> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

The Money Laundering Control Act of 1986, as amended, provides in pertinent part:

18 U.S.C. § 981. Civil forfeiture

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31....

(a)(2) No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder....

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section....

31 U.S.C. § 5324. Structuring transactions to evade reporting requirement prohibited

(a) Domestic coin and currency transactions. -- No person shall for the purpose of evading the reporting requirements of section 5313(a) ...

> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

STATEMENT OF THE CASE

This civil forfeiture case was brought under 18 U.S.C. § 981 ("money laundering"), for "structuring" monetary transactions in violation of 18 U.S.C. §§ 5313 and 5324.

The cash transactions which led to this seizure involved trustee Buck Klang's purchase, with trust funds, of numerous certified checks and money orders, in amounts of less than $10,000, to avoid the cash transaction filing requirement. The other trustees and the beneficiary did not know of the structuring.

The Property Seized

It is undisputed that the cash and monetary instruments seized in this case were "clean money," except for any involvement in "structuring." All of the cash and monetary instruments were the proceeds of U.S. savings bonds, which Lenora Klang (now in 79) had purchased regularly throughout the 1960's and 1970's, with earnings from employment. It is undisputed that Lenora Klang gifted the savings bonds to the Puppolo Family Trust shortly after the formation of that trust, and that the trustees decided, at a telephonic meeting, to cash the bonds and invest the proceeds in semi-numismatic gold coins purchased from International Collector's Association, Denver Colorado, (hereafter "ICA"). This was corroborated by the monetary instruments themselves, which listed Puppolo Family Trust as remitter, and ICA as payee. The cashiers checks and money orders were sent to ICA. The government seized them from ICA's possession.

The automobile seized, an older Mercury Zephyr, was titled in the name of Pluscuam Family Trust. It was seized on a "facilitation" theory, on the grounds that it had been driven to the various banks to purchase the "structured" money orders and certified checks. Buck Klang, trustee for both trusts, was driving the automobile at the time it was seized.

When Buck Klang was arrested and the Mercury automobile seized, $36,333.50 in cash was seized from the automobile or from Buck Klang's person. Puppolo Family Trust filed a claim for the cash, alleging it was the balance of the proceeds from sales of the savings bonds. The cash was never involved in any structured transaction or attempted transaction.

The Trusts

The claimants in this case are two family trusts, Puppolo Family Trust and Pluscuam Family Trust, which together owned all the property seized.

It is undisputed that both trusts were legally formed, and acquired the seized assets, as follows:

Pluscuam Family Trust was formed in Rusk County, Wisconsin on October 5, 1986, with an ounce of silver as the original trust res. Buck Klang and Sanford Knapp were named as trustees in the Declaration of Trust. Rebecca Klang was listed as the sole beneficiary. Later, other funds were gifted to the family trust. The trust purchased an older Mercury Zephyr automobile, which was immediately titled in the name of the trust. The Mercury is one of the assets seized in this case.

Puppolo Family Trust was formed on December 18, 1990. The Declaration of Trust lists Buck Klang and Lenora Klang as trustees, and Rebecca Klang as sole beneficiary. Sanford Knapp was later added as a trustee of the Puppolo Family Trust. The initial trust res was an ounce of silver, but shortly after formation of the trust, Lenora Klang gifted to the trust over $100,000 worth of U.S. savings bonds which Lenora Klang had purchased in the 1960's and 1970's with her earnings from employment.

At the time the Puppolo Family Trust was formed, Lenora Klang was 76 years old. Buck Klang is her only son, and Rebecca Klang is his wife. Lenora wanted to provide a

trust fund for her only daughter-in-law. Puppolo Family Trust was set up to receive the U.S. Savings Bonds Lenora had purchased in increments throughout the 1960's and 1970's. At the time she purchased each of the bonds, Lenora had listed her son Buck as her beneficiary/co-owner. The bonds remained in Lenora's possession until she gifted them to the Puppolo Family Trust in December 1990.

At a telephonic meeting of the trustees of the Puppolo Family Trust, the trustees decided to cash in the savings bonds and invest the proceeds in semi-numismatic gold coins, through International Collectors Association ("ICA"), a coin dealer in Denver, Colorado. Trustee Sanford Knapp had recommended that the trust invest in numismatic gold coins, and that it purchase the coins from ICA. In the telephonic meeting, Buck Klang was authorized by the trustees to cash in the savings bonds and use the proceeds to purchase rare gold coins from ICA.

After the telephonic meeting, Lenora delivered the bonds to Buck Klang, in his capacity as trustee. The savings bonds were cashed in by Buck Klang, as instructed, and they netted over $100,000. When Buck Klang called International Collectors Association to make arrangements with ICA to purchase the gold coins, ICA refused to accept such a large amount of cash and instructed Klang to obtain cashier's checks for the purchase.

On or about January 3, 1991, Buck Klang went to a bank to purchase the cashier's check and learned he would have to fill out an IRS cash transaction report in order to purchase cashier's checks of an amount over $10,000.

Without consulting the other trustees, Buck decided to avoid the IRS paperwork by purchasing the monetary instruments in amounts of less than $10,000. On January 3 and 4, 1991, he purchased over $88,000 in cashier's checks and a money order, with the Puppolo Family Trust's funds. As Buck Klang purchased the checks, he sent them to ICA for the pre-arranged purchase of gold coins.

On January 4, 1991, Buck Klang was arrested for structuring transactions to avoid the cash transaction reporting requirements. At the time of his arrest, federal agents seized: the automobile he was driving (belonging to Pluscuam Family Trust), $33,315.29 in cash, seized from the car, and $2,907.21 in cash, seized from Buck Klang's person.

When he learned of Buck Klang's arrest, Puppolo trustee Sanford Knapp contacted ICA and learned they had received the cashier's checks from Puppolo Family Trust, but that they were under subpoena to the U.S. Attorney's office, and could not be cashed until legal action was over.

Buck Klang went to trial in his criminal case and, on August 12, 1991, was convicted of committing "structured transactions." In October 1991, he was sentenced to 18 months imprisonment, three years of supervised release, and over $60,000 in fines, including the cost of his imprisonment.

The Forfeiture Case

The civil forfeiture complaint was filed on January 14, 1991. The trusts filed verified claims on March 15, 1991, after obtaining an extension of time to do so. Also on March 15, 1991, Sanford Knapp, as trustee for claimants, filed a motion to dismiss the forfeiture complaint. That motion was never ruled on.

On January 22, 1992, the government filed a motion for summary judgment alleging that the claimant trusts lacked standing to defend the forfeiture case. Claimants filed their opposition to the motion on March 9, 1992, and the government filed a reply on March 26, 1992.

On March 31, 1992, the government filed an application for order directing the claimants to show cause why the government's motion for summary judgment should not be granted. The judge signed the order that same day. The Show Cause Order specifically ordered Sanford Knapp, a trustee for

both trusts, and Gregory Pieper, attorney for the trusts, to appear at a hearing on June 2, 1992 to show cause why summary judgment should not be granted to the government. No one else was ordered to appear.

On June 2, 1992, Gregg Pieper, and Sanford Knapp appeared, as ordered, for the show cause hearing on the government's motion for summary judgment on the issue of standing.

At the show cause hearing, the court placed the burden of proof on the claimants to show "standing" -- by a preponderance of the evidence -- without ever requiring the government to show probable cause for forfeiture. Based on his findings at the evidentiary hearing, the District Court Judge held that the trusts had failed to prove Article III standing to defend the forfeiture case. The judge then granted the government's motion for summary judgment, holding that the claimant trusts lacked Article III standing to defend the forfeiture case.

The Appeal to the Eleventh Circuit

Claimants timely appealed to the Eleventh Circuit. The case was thoroughly briefed, and was argued on May 18, 1993. On June 2, 1993, the Eleventh Circuit affirmed, without opinion, the District Court's order granting summary judgment. The Eleventh Circuit's order was unpublished and marked "not for publication." A copy appears at Appendix A.

Claimants filed a petition for extension of time to file a petition for certiorari, which was granted, extending the time for filing a petition for certiorari until October 29, 1993.

REASONS FOR GRANTING THE PETITION

1. The District Court erred in requiring the claimants to prove "standing" before requiring the government to prove probable cause

a. Probable cause must be determined before a claimant can be required to show standing

It is clear from the plain language of the federal civil forfeiture statutes that the government, which has disturbed the status quo by seizing property, has the first burden of going forward at any evidentiary hearing.

The money laundering forfeiture statute at issue here, 18 U.S.C. § 981(d), incorporates by reference the provisions of the Customs laws, including 19 U.S. Code § 1615, which provides that, in any forfeiture case:

> the burden of proof shall lie upon [the] claimant; ... Provided, that probable cause shall first be shown for the institution of such suit.

Nevertheless, there is wide disparity among the federal Circuits as to which determination comes first, the government's requirement of establishing probable cause to believe property is forfeitable, or the claimant's requirement of establishing "standing" to contest the forfeiture.

The concept of a "threshold requirement" that the claimant demonstrate "Article III standing" -- before the government has to demonstrate probable cause to believe the property is forfeitable -- is being relied on more and more by federal courts to summarily dismiss property owners' claims, preventing them from defending their property against forfeiture. *See, e.g. United States v. $38,000,* 816 F.2d 1538 (11th Cir. 1987):

> There are two different forms of standing at issue in this case. Article III standing and statutory standing. It is well established that a claimant first must demonstrate a sufficient interest in the property to give him Article III standing; otherwise, there is no "case or controversy," in the constitutional sense, capable of adjudication in the federal courts.... Thus, contrary to appellants' argument, unless they have Article III standing, federal courts lack jurisdiction to consider their claims, including their claim that the government did not have the requisite probable cause to seize the defendant property. 816 F.2d at 1543 (citations and footnotes omitted).[1]

Other courts including the Sixth Circuit,[2] require the government to establish probable cause before the issue of standing arises, on a motion for summary judgment.

---

[1] *Accord, United States v. $38,570,* 950 F.2d 1108 (5th Cir. 1992); *United States v. One 1976 Cessna Model 210L Aircraft,* 890 F.2d 77 (8th Cir. 1989); *United States v. $15,500,* 558 F.2d 1359 (9th Cir. 1977).

[2] *United States v. Premises Known As 526 Liscum Drive,* 866 F.2d 213 (6th Cir. 1988) ("[O]nce the government has met its burden of showing probable cause to institute the forfeiture action, the burden then shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture.... As an element of this burden, claimant has the burden of proving an interest in the property sufficient to establish her standing...") *See also, United States v. 2511 E. Fairmont Ave.,* 722 F.Supp. 1273 (D.Md. 1989); *United States v. A Fee Simple Parcel, Bal Harbour, Fla.,* 650 F.Supp. 1534 (E.D. La. 1987); *United States v. $30,800,* 555 F.Supp. 280 (E.D.N.Y. 1983).

To add to the confusion, other cases use the term "standing" to refer to the claimant's burden of showing ownership at trial, after probable cause is found and the burden of proof has shifted to the claimant to prove innocent ownership.[3] Moreover, the language quoted from many of the older cases relied upon as establishing the standards for the "threshold standing requirements" actually involved the standards for demonstrating ownership at trial -- after a finding of probable cause.

b. Only a factual dispute is required for a threshold showing of standing

An even wider disparity exists among the Circuits in the standards of proof for determining the "threshold issue" of standing on a motion for summary judgment.

In *United States v. One Parcel... Known As 116 Emerson Street,* 942 F.2d 74, 78 (1st Cir. 1991), the court held that the threshold showing of standing is a very low standard, demonstrating any ownership or possessory interest in the property:

> At this preliminary juncture, however, the claimant need not prove the full merits of her underlying claim. All that needs to be shown is a "facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement and 'prudential considerations defining and limiting the role of the court.'"

The Eleventh Circuit held in *$38,000* that the claimant need not own the property to have sufficient standing to

---

[3] *See, e.g., United States v. A Single Family Residence... Located at 900 Rio Vista Blvd.*, 803 F.2d 625, 630 (11th Cir. 1986); *United States v. One 1982 Porsche 928*, 732 F.Supp. 447, 452 (S.D.N.Y. 1990).

withstand a motion for summary judgment; a possessory interest, or even constructive possession was held to be enough.

At the opposite extreme sits the Fifth Circuit, which has evolved increasingly more burdensome standing requirements, culminating in the anomolous case of *United States v. $38,570*, 950 F.2d 1108, 1111-12 (5th Cir. 1992), which held:

> "Standing ... is literally a threshold question for entry into a federal court."[4] ... To contest a forfeiture action, an individual bears the burden of "demonstrat[ing] an interest in the seized item sufficient to satisfy the court of his standing" as a claimant.[5]
>
> We recognize that Flores need not prove his case to establish standing to bring suit.... This court has held that, to establish standing, "[a] claimant need not prove the merit of his underlying claim, but he must be able to show at least a facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirements...." We must therefore address how much, if any, evidence Flores must produce in order to meet the threshold requirements of standing....
>
> Indeed, in [*United States v. $321,470*, 874 F.2d 298 (5th Cir. 1989)] we labeled the claimaint's need to "demonstrate" an ownership interest as a "burden of proof."... *Id.* [at 304], *cf. U.S. v. One 1976 Cessna Model 210L Aircraft*, 890 F.2d 77, 80 (8th Cir. 1989) ("To prove this threshold issue, a

---

[4] quoting *United States v. $321,470*, 874 F.2d 298, 302 (5th Cir. 1989)

[5] quoting *United States v. $47,875*, 746 F.2d 291, 298 (5th Cir. 1984).

claimant must prove that he or she is the owner of the property subject to the forfeiture action.") (emphasis added); ... *U.S. v. $280,505,* 655 F.Supp. 1487, 1495 (S.D. Fla. 1986) (claimant must demonstrate her interest in property by a preponderance of the evidence to establish standing)....

We note that these decisions indicate that the claimant must come forth with *some* evidence of his ownership interest in order to establish standing to contest a forfeiture. We agree with the reasoning of these cases, and hold that a bare assertion of ownership of the *res,* without more, is inadequate to prove an ownership interest sufficient to establish standing....

Ordinarily, therefore, a claimant is required to submit some additional evidence of ownership along with his claim in order to establish standing to contest the forfeiture.[6] In this case,

---

[6] This proposition that the claimant is required to submit additional evidence of standing along with his claim was rejected by David B. Smith, in his treatise *Prosecution and Defense of Forfeiture Cases* (June 1993 ed.), p. 9-58.8:

> In a recent case, however, the Fifth Circuit apparently took the position that, ordinarily "a claimant is required to submit some additional evidence of ownership along with his claim in order to establish standing to contest the forfeiture." This is incorrect. There is no justification or authority for requiring a claimant to submit proof of his standing along with his claim. Rule C(6) does not require such evidence and the very short time limit for filing a claim

(continued...)

> however, Flores need not have supplemented his claim with additional evidence, because the government had admitted Flores' relationship to the currency in its complaint. We recognize that ownership can be evidenced in a variety of ways. Courts generally look to indicia of dominion and control such as possession, title, and financial stake.

$38,570 at 1112-13.

> **c. Had the court forced the government to show probable cause first, some of the property seized would not have been forfeited**

Had the government been forced to prove probable cause before the court shifted the burden of proof to claimants, it is doubtful the court could have found probable cause as to at least some of the property.

The seizure of the car would probably not withstand a probable cause determination. The money laundering forfeiture statute does not include property used to "facilitate" a transaction in violation of the structuring laws, but only property "involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31...."

In addition, the $36,333.50 in cash seized was never "structured," nor was there any evidence that it was involved

---

[6](...continued)

> would create problems in some cases if a claimant had to submit proof of his standing along with his ownership claim. It would also be a trap since the language of the rule does not require a claimant to support his claim of ownership with proof.

in an "attempted transaction" in violation of the structuring law.

2. When the District Court required the claimants to prove standing by a preponderance of the evidence, it applied the wrong standard for determining standing on a motion for summary judgment

Even if the court below did not specifically cite the Fifth Circuit's anomolous opinion in *$38,570,* it is clear that the judge's reasoning rested on the same theory, only taken a step further.

The District Court forced the claimant trusts to prove standing by a preponderance of the evidence, when the government never refuted any of the evidence claimants presented in establishing standing.

The Order to Show Cause, which ordered Gregg Pieper, attorney for the trusts, and Sanford Knapp, one of the trustees for the trusts -- but no one else -- to appear at the hearing, did not indicate that it would be a hearing on the merits, or that the claimant would have the burden of proof -- as opposed to the burden of showing facts in dispute.

Despite the clear indications that the hearing was, at the most, a hearing on the pending motion for summary judgment[7] and possibly on the motion to dismiss,[8] *but not on the merits,* the District court acted as if it were a trial on the merits.

---

[7] The Order to Show Cause, the transcript of the show cause hearing, and the memorandum opinion -- all indicate that the hearing was on the government's motion for summary judgment.

[8] The memorandum opinion indicates that the hearing also included consideration of claimants' motion to dismiss, but no decision was ever made on that motion.

This was improper and clearly irregular under the rules.

a. The proper standard for determining whether to grant summary judgment is whether there are material facts in dispute

Summary judgment is not proper if there are any genuine disputes of material fact. A factual dispute is genuine if a reasonable jury could return a verdict for the non-moving party. *United States v. Four Parcels of Property*, 941 F.2d 1428 (11th Cir. 1991):

> In determining whether to grant summary judgment, the district court must remember that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson [v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986)]. Accordingly, on summary judgment, "the evidence of the non-movant is to be believed." *Id.* at 255, 106 S.Ct. at 2513. The district court should "resolve all reasonable doubts about the facts in favor of the non-movant" ... and draw "all justifiable inferences ... in his favor...." "If more than one inference could be construed from the facts by a reasonable fact finder, and that inference introduces a genuine issue of material fact," summary judgment is not justified.

Four Parcels at 1437 (citations omitted).

b. The court acted as if the hearing were the trial on the merits rather than the government's motion for summary judgment on the issue of standing

1. The judge indicated that credibility of the claimants' witness was at issue

During cross-examination, the attorney for the government asked Knapp what other trusts he is a trustee for. Knapp objected on Fifth Amendment grounds. The District Court judge responded:

> Mr. Knapp's credibility is at issue now. Who he is and what he does and where he comes from is very relevant. (Tr. p. 39 l. 12).

The weighing of credibility of witnesses is not permissible in granting summary judgment. If there are any material facts in dispute, including the weighing of credibility, then summary judgment is improper. *Anderson v. Liberty Lobby, supra,* 477 U.S. at 255, 106 S.Ct. at 2513.

2. The judge made comments indicating he was weighing claimants' evidence against the governments'

At the hearing, the judge commented on missing evidence he felt the claimant should have produced. The judge said he did not understand why the trust hadn't taken the testimony of Lenora Klang or produced the books and records of the trust at the hearing.[9] However, the Order to Show Cause ordered only Sanford Knapp and Gregory Pieper to appear. The order to show cause did not give claimants any notice that

---

[9] Transcript p. 95 l. 8.

they would have to "prove" standing, at the show cause hearing, by a preponderance of the evidence.

3. The judge discussed the burden of proof at the hearing

The transcript of the hearing shows that the District judge did not understand the "burden of proof" on a claimant to withstand summary judgment on the issue of standing. Instead of using the proper standard of "a genuine dispute of material fact", the judge made it clear he expected the claimant to prove innocent ownership by a preponderance of the evidence -- at the pretrial hearing on the government's motion for summary judgment on the issue of standing.

> Court: "Whose burden is it to establish innocent ownership?"
>
> Pieper: "It's ours."
>
> Court: "Well there's no evidence about these matters."[10]

Attorney Pieper then tried to explain to the judge the difference between the burden of proof at trial on the ultimate issue of innocent ownership and the preliminary determination of standing sufficient to survive a motion for summary judgment. Pieper pointed out that to avoid summary judgment, all the trusts had to prove was a genuine dispute of fact about a material issue.[11] But the judge never seemed to comprehend the difference.

---

[10] Transcript p. 107 ll. 21-25.

[11] Transcript p. 108 l. 18.

Court: "You're trying to argue that you've established innocent ownership; is that what you're saying?"

Pieper: "Yes Your Honor, among other things."

Court: "Well in the second breath, you tell me there's a dispute of fact about it."[12]

4. In granting summary judgment, the court impermissibly placed the burden of proving ownership on the claimants, without first requiring the government to show probable cause

On its face, the court order shows that the judge weighed the evidence and found it not to be enough to meet some unspecified burden of proof -- and then granted summary judgment. Again this is improper. Summary judgment is not permissible if there are any disputes as to issues of material fact.

After hearing the testimony of the claimants' sole witness, Sanford Knapp, the court commented that there was no documentary evidence submitted to corroborate the witness's testimony. Yet Knapp's testimony went totally unrefuted, since the government put on no evidence to dispute the witness's testimony.

Furthermore, the forfeiture statutes make it clear that the government must show probable cause for the institution of the forfeiture case before the claimant has the burden of going forward.

---

[12] Transcript p. 108 l. 4 - 9.

There is no indication that the parties agreed to submit the case on cross-motions for summary judgment rather than go to trial.

The "Order to Show Cause" contained no indication that the parties were being summoned to this "show cause" hearing to put on a trial on the merits, yet that is what the court effectively did.

Although the anomalous 5th Cir. case of *$38,570* seems to require a pretrial evidentiary hearing on standing -- at which the claimant bears the burden of proof by a preponderance of the evidence -- that ruling does not apply in the Eleventh Circuit, where this case was brought.

Furthermore, *$38,570* itself holds that claimants need not present additional evidence of ownership when the claimant's relationship to the seized property appears on the face of the government's verified complaint. In this case, Puppolo Family Trust's relationship to the seized property appears in the complaint itself, which lists Puppolo Family Trust as the remitter on each of the monetary instruments seized.

C. The trust introduced sufficient evidence of standing to withstand summary judgment

Under the standard set out in *$38,000, supra*, claimant trusts would have standing to defend this forfeiture case. In *$38,000,* the Eleventh Circuit held that a possessory interest, or even constructive possession was enough to establish standing:

> Moreover, although David [the claimant] was not in actual possession of the currency, he was in constructive possession of the currency when it was seized, in that the currency was seized from David's employee, Woods, while Woods was transporting it to Miami at David's request.

> Constructive possession such as this is sufficient to confer Article III standing.[13]

The facts of *$38,000* are virtually identical to those here, and the cases were in the same Circuit, yet the court below ignored this precedent. It is difficult to see how the court could distinguish these two cases, when, in both cases, the property was seized from the possession of an agent of the claimant, while the agent was performing business on behalf of the claimant.

Additionally, claimants in this case produced substantial, and undisputed, evidence of trust ownership of the property.

Both trusts were formed with duly executed Declarations of Trust, prior to any alleged illegal activity. The Mercury Zephyr seized in this case was titled in the name of Pluscuam Family Trust, and was being driven by a Pluscuam trustee at the time of seizure.

The Puppolo Family Trust, shortly after its formation, was gifted over $100,000 worth of savings bonds by trustee Lenora Klang, then 76, who had purchased them in increments throughout the 1960's and 1970's, naming her only son Buck as co-owner/beneficiary. The transfer of the bonds to the trust by gift had been authorized by telephonic meeting of the Board of Trustees, at which it was agreed the trust would cash in the savings bonds and purchase semi-numismatic gold coins for the trust. It was also mutually agreed that Buck Klang would perform the transaction of cashing in the savings bonds and purchasing the gold coins, from International Collectors Association, a coin dealer in Denver, Colorado.

---

[13] *Id.* at 1544.

The trust's ownership of the proceeds of the bonds continued uninterrupted. Because cash cannot be titled, its ownership was manifest by its continuous possession by a trustee. Puppolo Family Trust's ownership of the monetary instruments is demonstrated on the face of each monetary instrument, which lists Puppolo Family Trust as the remitter and International Collector's Association as payee. Furthermore, the monetary instruments were immediately sent to ICA, and the government seized them from ICA's possession.

The $36,333.50 in cash seized in this case was in the possession of trustee Buck Klang when it was seized.

The trusts' mutual trustee, Buck Klang, was acting as agent of the trusts when he cashed in the savings bonds and obtained the checks. As trustee, Klang acted within the scope of his duties to the trust in conducting the transaction to purchase the gold, until he broke the law by structuring the transactions in order to avoid filling out IRS paperwork. The Declaration of Trust specificially prohibited the trustees from acting unlawfully in the performance of their duties.

This unrebutted evidence shows the claimants have satisfied any "burden of proof" they might have on the threshold issue of standing to defend the forfeiture of their property.

CONCLUSION

This case involves issues on which the Circuits are widely divided. Extremely important Constitional rights are at stake.

This Court has recently recognized that civil forfeiture is "punishment." *Austin v. United States,* ___ U.S. ___, 113 S.Ct. 2801 (1993). However, the implications of that ruling have yet to be reflected in any improvement of the procedural safeguards afforded property owners in civil forfeiture cases.

Because of the lasting remnants of the legal fiction that the property -- not the property owner is on trial -- civil forfeiture procedures provide even less Due Process than the ordinary civil case. Since civil forfeiture is punishment, property owners should be afforded more, not less, Due Process than in other civil cases.

When the already thin fabric of Due Process in civil forfeiture is stretched further, by artificial rules of standing that require the property owner to come forward and prove innocent ownership -- before the government ever has to prove anything -- then the level of Process afforded falls pitifully below the standards acceptable under our Constitution.

It is inconceivable that the Founding Fathers intended that Article III of the Constitution could be used to deprive property owners of the right to defend their property from summary forfeiture to the government. Such a construction is a perversion of Due Process.

Accordingly, this Court should grant certiorari.

Respectfully submitted,

BRENDA GRANTLAND
Attorney for Petitioners
265 Miller Avenue,
Mill Valley, CA 94941
(415) 380-9108

October 29, 1993

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8786

D.C. Docket No. CIV 91-21-3-MAC(WDO)

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

THIRTY-SIX THOUSAND, TWO HUNDRED TWENTY-TWO AND 50/100 DOLLARS IN UNITED STATES CURRENCY; ONE BLACK MERCURY ZEPHYR, VIN: 1MEBP71B1CK627651; ONE MONEY ORDER NUMBER 04-443-512,526, Purchased at First State Bank, Albany, Georgia; VARIOUS CASHIER'S CHECKS, NUMBERS 1590924, 039032, 09101243, 78596, 0390, 005922, 462-5420504, 36336, 1572163, L0671399, 12030, 30871, 70128, Defendants,

LENORA KLANG, Claimant,

PLUSCUAM FAMILY TRUST AND PUPPOLO FAMILY TRUST, Claimants-Appellants,

SANFORD KNAPP, Claimant.

Appeal from the United States District Court for the Middle District of Georgia

---

(June 2, 1993)

Before BIRCH, Circuit Judge, CLARK, Senior Circuit Judge, and HOEVELER*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

---

*Honorable William M. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. C.A. 91-21-3-MAC (WDO)

$36,225.50, et al.,
Defendants

ORDER

Before the court is defendant's motion to dismiss and the United States' motion for summary judgement. After careful consideration of the arguments of counsel, the relevant case law, and the record as a whole, the court issues the following order.

FACTS

In this case, the United States seeks forfeiture of defendant property pursuant to 18 U.S.C. §981(a)(1)(A). Defendant property, one black Mercury Zephyr, $36,225.50 in United States currency, various cashiers' checks and one money order was property involved in a transaction or attempted transaction in violation of 31 U.S.C §5324[1].

---

[1] No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction

...

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

On January 3, 1991, Buck Arthur Klang entered six different Georgia banks and purchased a cashiers' check in the amount of $9,000 from each bank. On the same day, Buck Klang also entered two other banks and purchased a cashiers' check with cash in the amount of $9,600 from each bank. The remitter for each check was the Puppolo Family Trust, and the payee for each check was International Collectors Associates. Klang also purchased an $820 money order with cash from one of the banks, and its payee was International Collectors Associates.

Klang entered an additional bank on January 3, 1991, and asked about procedures for obtaining cashiers' checks. A bank employee informed him that the bank was required to file a Currency Transaction Report on all cash transactions over $10,000. In addition, the bank was required to obtain identification for any cash purchase of a cashiers' check in excess of $3,000 and to record this information in a log.

On January 4, 1991, Buck Klang entered five different banks and purchased a cashiers' check with cash in the amount of $2,800 from each bank. The remitter for each check was the Puppolo Family Trust, and the payee for each check was International Collectors Associates.

Klang entered an additional bank on January 4, 1991, where he attempted to purchase a cashiers' check for $2,800. A bank employee informed him that the bank required identification and that the transaction would be entered into a log. Klang left the bank without purchasing a cashiers' check.

Shortly after this incident occurred, Klang was arrested at Central Savings Bank, Cordele, Georgia, for attempting to structure transactions in order to evade currency reporting requirements.

Klang used a black Mercury Zephyr, a defendant in this forfeiture action, during these transactions. Police officers searched the vehicle pursuant to a warrant on January 4, 1991.

During the search, the officers recovered $33,315.29 in currency from the vehicle, and they recovered $2,907.21 in currency from Klang's person for a total of $36,222.50.

On February 14, 1991, a federal grand jury returned a sixteen count indictment against Klang for violations of 31 U.S.C. § 5324. Klang was convicted on all counts on August 12, 1991. His conviction is currently on appeal.

The United States filed this complaint for forfeiture on January 14, 1991. On March 15, 1991, the Pluscuam Family Trust filed a claim for the Mercury Zephyr and the Puppolo Family Trust filed a claim for the $36,222.50 in currency, the money order and cashiers' checks. The trust also filed a motion to dismiss the forfeiture action. The United States filed a motion for summary judgment on January 22, 1992.

The court held an evidentiary hearing on June 2, 1992, in which the claimant trusts were to show cause why summary judgment should not be entered in favor of the United States. At the hearing the sole witness for the claimants was Sanford Knapp, a trustee for both trusts. He testified that the currency used by Buck Klang to purchase the cashiers' checks belonged to the Puppolo Family Trust.

The Puppolo Family Trust was created December 18, 1990, and Buck Klang and his mother, Lenora Klang, were the original trustees. Sanford Knapp became a trustee shortly after the creation of the trust. According to Knapp, Buck Klang's wife, Rebecca Klang, is the sole beneficiary of the trust. The only property originally part of the trust corpus was an ounce of silver. The silver was not produced at the hearing.

Sometime after the Puppolo Family Trust was created, Lenora Klang gave Buck Klang some savings bonds to cash. Both Lenora and Buck Klang were named as owners of these bonds. No record of these bonds were produced at the hearing. According to Knapp, Lenora and Buck Klang had decided to give the bonds to the Puppolo Family Trust, and the bonds were

to become trust property after they were converted to cash. The trustees also agreed that the cash from the bonds would be used to purchase rare coins from International Collectors Associates ("ICA"). The claimants submitted no documentation of any such agreement between the trustees.

Knapp testified that the ICA refused to accept a huge sum of cash for the purchase of the rare coins; therefore, Buck Klang obtained cashier's checks to substitute for the cash. Klang was acting in his capacity as trustee of the Puppolo Family at this time; however, the Puppolo Family Trust had no knowledge that Klang was procuring these checks in a manner in violation of the law. Thus, according to Knapp, the currency, checks and money order were trust property at the time of these transactions. The property did not belong to Buck Klang individually. Knapp had no personal knowledge of any of Klang's transactions in converting the savings bonds to cash and purchasing cashier's checks.

Knapp also testified that the Mercury Zephyr belonged to the Pluscuam Family Trust, which was created on October 5, 1986, and names Buck A. Klang and Sanford G. Knapp as trustees. The Declaration of Trust names Buck Klang's wife, Rebecca A. Klang, and Ardyth Hinaus as beneficiaries of the trust.

According to Knapp, the trust obtained the Mercury Zephyr sometime after the creation of the trust. The trust is named as the registered owner of the vehicle on the Certificate of Title dated September 26, 1990. Knapp testified that Buck Klang had possession of the vehicle except on a few occasions when Buck Klang visited Knapp in Wisconsin. Rebecca Klang was the only other person to use the vehicle. No evidence was presented that Buck Klang used the vehicle for anything other than personal business.

The United States presented IRS agent Kennedy Lockhart as its only witness. Lockhart testified about an interview he had with Lenora Klang shortly after Buck Klang was arrested. Mrs.

Klang told agent Lockhart that she had given her savings bonds to her son, Buck Klang, to cash for his personal business. This concluded all evidence presented at the hearing.

DISCUSSION

A claimant must establish Article III standing in order to contest a civil forfeiture action. *United States v. $38,000.00,* 816 F.2d 1538, 1543 (11th Cir. 1987). If a claimant cannot establish Article III standing, this court has no jurisdiction to hear its claim. *Id.* The claimant must "'demonstrate an interest in the seized item sufficient to satisfy the court of its standing to contest the forfeiture.'" *United States v. $500,000.00,* 730 F.2d 1437, 1439 (11th Cir. 1984) (quoting *United States v. $364,960.00,* 661 F.2d 319, 326 (5th Cir. Unit B 1981).

The claimants in this case have failed to establish Article III standing. Claimant Puppolo Family Trust contends that the currency, cashier's checks, and money order were property of the trust rather than property of Buck Klang. However, the only evidence presented by claimant that this property belonged to the trust was Knapp's testimony that savings bonds owned by Lenora and Buck Klang became trust property when the bonds were converted to cash and that this cash was to be used to purchase rare coins for the trust. Without any documentation whatsoever, Knapp's testimony is insufficient to establish trust ownership. *United States v. One Parcel of Land,* 902 F.2d 1443, 1445 (9th Cir. 1990).

Furthermore, the mere fact that Buck Klang designated Puppolo Family Trust as remitter on the cashier's checks is insufficient to establish an ownership interest in them. Hence, claimant Puppolo Family Trust has no standing to challenge the forfeiture of the currency, cashier's checks and money order.

Claimant Pluscuam Family Trust claims that the Mercury Zephyr is property of the trust. Claimant relies upon the testimony of Sanford Knapp and the Certificate of Title which

names "Pluscuam Family Trust" as registered owner to establish ownership in the property.

Knapp testified that the trust purchased the vehicle sometime after the creation of the trust in 1986. However, Knapp had no other knowledge of how, when, and where the vehicle was purchased and what funds were used to purchase the vehicle. Furthermore, claimant produced no documentation concerning the alleged purchase of the vehicle by the trust.

This evidence is insufficient to establish ownership of the vehicle. Furthermore, the Certificate of Title does not establish ownership because "possession of bare legal title by one who does not exercise dominion and control over the property is insufficient...to establish standing." *United States v. A Single Family Residence,* 803 F.2d 625, 630 (11th Cir. 1986). Knapp's testimony was that Buck Klang had dominion and control over the vehicle and that Klang and his wife used it for personal use. There was no evidence that Klang ever used the vehicle for trust purposes. Therefore, claimant Pluscuam Family Trust has no standing to contest this forfeiture action.

As neither claimant has established standing, this court has no jurisdiction over their claims. Accordingly, the United States' motion for summary judgment is GRANTED.

SO ORDERED, this 8th day of June, 1992.

WILBUR D. OWENS, JR.
UNITED STATES DISTRICT JUDGE